Supreme Court, U. S.
FILED
DEC 1 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC, INC., and S.A.M. INDUSTRIES, INC.,
Petitioners,

VS.

GTE SYLVANIA INCORPORATED,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

LAWRENCE A. SULLIVAN,
Boalt Hall School of Law,
Berkeley, California 94720,
Telephone: (415) 642-5451,

GLENN E. MILLER,
800 Crocker Plaza,
San Jose, California 95113,
Telephone: (408) 294-9046,
Attorneys for Petitioners.

JESSE CHOPER,
Boalt Hall School of Law,
Berkeley, California 94720,
Telephone: (415) 642-5451,

RUDY, RAPOPORT & HOLDEN, INC.,
235 Montgomery Street,
San Francisco, California 94104,
Telephone: (415) 981-4850,
Of Counsel.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement of the case	3
Proceedings in the District Court	3
1. The evidence shows that Sylvania, at the demand of its Sacramento dealer, enforced its resale restriction to stamp out intrabrand competition in Sacramento..	5
2. Given the evidence reviewed above, the District Court properly gave a *per se* instruction based on the *Schwinn* rule	18
3. On Continental's claim for equitable relief the trial judge made findings of fact favorable to Continental and granted limited relief	22
Proceedings in the Court of Appeals	22
Summary of argument	25
Argument	29
I. As enforced in Sacramento, Sylvania's elbow room policy was a clear violation of the *Schwinn per se* rule. Therefore, the instruction given was correct	29
A. The trivial distinctions in form between the way Sylvania stamped out intrabrand competition in Sacramento and the way Schwinn achieved its similar purpose should not enable Sylvania to evade the *Schwinn per se* rule	29
B. The policies supporting the *Schwinn per se* rule are fully applicable here	37
II. Cases upholding exclusive dealerships, location clauses and comparable arrangements involving no resale restrictions do not imply that a manufacturer may forbid one dealer from shipping his merchandise into another dealer's area for resale	42
III. Denying a manufacturer the power to restrict intrabrand competition will not adversely affect consumer welfare or resource allocation	49

Page

IV. Granting a manufacturer the power to restrict intra-brand competition will adversely affect consumer welfare and resource allocation 54

V. There is no failing company or retroactivity defense to be preserved for further proceedings in the Court of Appeals 60

A. The holdings of *Schwinn* and other cases show that the "remaining in business" instruction was properly denied 61

B. Sylvania has shown neither a clear and established rule sanctioning its conduct at the time it acted, nor any element of reliance 64

Conclusion 71

Table of Authorities Cited

Cases **Pages**

Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (2nd Cir. 1942), rehearing denied, 130 F.2d 196 (2nd Cir. 1942), cert. denied, 317 U.S. 695 (1943) 65, 66, 68, 69

Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962) 39, 55

Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) 63

Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934, rehearing denied, 509 F.2d 758 (5th Cir. 1975) 31, 60

Dr. Miles Co. v. John D. Parke & Sons Co., 200 U.S. 373 (1911) 27, 37, 38, 49, 50, 51, 52, 66

Eastex Aviation, Inc. v. The Sperry & Hutchinson Co., 522 F.2d 1299 (5th Cir. 1975) 31

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 28, 64, 65, 69

Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973) 31, 45, 49

Pages

Interphoto Corp. v. Minolta Corp., 417 F.2d 621 (2d Cir. 1969) 31, 45

Johnson v. Schlitz Brewing Co., 33 F.Supp. 176 (E.D. Tenn. 1940) aff'd, 123 F.2d 1016 (6th Cir. 1941) 65

Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062, rehearing denied 397 U.S. 1003 (1970) 42, 43, 44

Kaiser v. General Motors Corporation, 530 F.2d 964 (3d Cir. 1976), aff'g 396 F.Supp. 33 (E.D. Pa. 1975) 46

Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 65

Northern Pacific R.R. v. United States, 356 U.S. 1 (1958) 39, 55

Reed Brothers, Inc. v. Monsanto Company, 525 F.2d 486 (8th Cir. 1975), cert. denied, 46 L.Ed. 645 (U.S. S.Ct. 1976) 31, 49

Salco Corporation v. General Motors Corporation, 517 F.2d 567 (10th Cir. 1975) 46

Simpson v. Union Oil Co., 377 U.S. 13 (1964) 30, 39, 55, 68

Simpson v. Union Oil Co., 396 U.S. 13 (1969) 69, 70

United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920) 39

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), aff'd 175 U.S. 211 (1899) 45

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) .....passim

United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944) 65

United States v. General Motors Corp., 384 U.S. 127 (1966) 47, 64

United States v. Glaxo Group Ltd., 302 F.Supp. 1 (D.D.C. 1969), rev'd on other grounds, 410 U.S. 52 (1973) 31

United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971) 63

United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961) 63

Pages

United States v. Libby Owens Ford Glass Co., 1948-49 CCH Trade Cases ¶62,323 (N.D. Ohio 1948) 30, 66

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 40

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 2, 3, 26, 39, 40, 52

United States v. White Motor Co., 1964 CCH Trade Cases ¶71,195 (N.D. Ohio 1964) 30, 67

White Motor Co. v. United States, 372 U.S. 253 (1963) 30, 38, 48, 52, 54, 67, 69

Statutes

28 U.S.C. Sec. 1254(1) 2

Public Law 94-145, December 12, 1975 ..... 27, 41, 52

Public Law 94-435, September 30, 1976 41

Texts

Automatic Distribution, Hearing Before Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. 65-66 (1958) 66

Automobile Marketing Legislation, Hearings Before A Subcommittee of House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess. 359-65 (1956) 66

Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 75 Yale L. J. 373 (1966) .. 51

75 Yale L. J.:
- Page 391 51
- Pages 397-429 51
- Pages 430-453 51
- Pages 453-465 51

Bowman, The Prerequisites and Effects of Resale Price Maintenance, 22 Univ. Chi. L. Rev. 825 (1955) 54

Comanor, Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath, 81 Harv. L. Rev. 1419 (1968) 51, 54

Pages

Hart-Scott-Rodino Antitrust Improvements Act of 1976 ... 41

Jordan, Exclusive and Restricted Sales Areas Under The Antitrust Laws, 9 U.C.L.A. L. Rev. 111, 142-155 (1961) 66

Kessler & Stern, Competition, Contract and Vertical Integration, 69 Yale L. J. 1, 113 (1959) 66

Rifkind, Division of Territories, in Van Cise and Dunn, How To Comply With The Antitrust Laws, 127, 134-135 (1954) 43, 66, 67

Schildkraut, Areas of Primary Responsibility and Other Territorial Restraints In Channels Of Distribution Under The Antitrust Laws: A Legal and Economic Analysis, 11 Colum. J. of Law and Soc. Prob. 509 (1975) 49

Stewart, Franchise or Protected Territory Distribution, 8 Antitrust Bull. 447, 470 n. 51 (1963) 30, 66

Stone, Closed Territorial Distribution: An Open Question in the Sherman Act, 30 U. Chi. L. Rev. 286, 288 (1963) 51, 67

The Supreme Court, 1962 Term, 77 Harv. L. Rev. 62, 172 (1963) 67

Zimmerman, Distribution Restrictions After Sealy and Schwinn, 12 Antitrust Bull. 1181, 1182-86 (1967) 51, 60

Other Authorities

H.R. 6084, S. 3421 40

Senate Report No. 94-1195 (August 31, 1976) 40

United States Department of Commerce, Franchising in the Economy 1972-1974 (1974) 41

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-15

CONTINENTAL T.V., INC., A & G SALES, SYLPAC, INC.,
and S.A.M. INDUSTRIES, INC.,
Petitioners,

VS.

GTE SYLVANIA INCORPORATED,
Respondent.

On Writ of Certiorari to the Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 537 F.2d 980 (9th Cir. 1976) and reprinted in the appendix to the petition herein. (Pet. App. 1-114)[1] The District Court wrote no opinion. It entered Findings of Fact and Conclusions of Law which are not reported, but also are reprinted in the appendix to the petition. (Pet. App. 115-129)

---

[1]"Pet. App." refers to appendices to the Petition for Writ of Certiorari herein.

JURISDICTION

The Court of Appeals entered judgment on April 9, 1976. Petitioners on July 8, 1976 filed their petition for certiorari which was granted on October 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1) If a TV manufacturer selling direct to retail dealers restricted intrabrand competition by assigning to each dealer a territory in which alone it could resell, the arrangement would blatantly violate the *per se* rule of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

Can such a manufacturer evade the *Schwinn* rule merely by changing the form of the restraint from one forbidding dealer "A" to sell in dealer "B's" territory to one forbidding dealer "A" to resell from any store location from which it is possible to sell in the territory served by dealer "B"?

2) *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972) and *United States v. Arnold, Schwinn & Co.*, supra, establish that claimed benefits to interbrand competition cannot excuse horizontal or vertical territorial restrictions which foreclose intrabrand competition.

Does the form of the territorial resale restriction in this case require the application of the rule of reason, to balance speculative benefits to interbrand competition against certain and intentional injury to intrabrand competition?

3) Even if it were assumed, contrary to *Topco* and *Schwinn*, that a judge or jury could balance speculative gains to interbrand competition against certain harm to intrabrand competition they would presumably need evidence with which to do so.

When a resale restraint eliminating intrabrand competition has been shown, should the trier of fact be compelled to speculate about a possible benefit to interbrand competition and its relative weight when the only economic evidence shows that given the present state of economic knowledge it is impossible to tell whether a restraint upon intrabrand competition has resulted in any benefit to interbrand competition?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable statutes are set out in the appendix to the petition herein. (Pet. App. 130-133)

STATEMENT OF THE CASE

PROCEEDINGS IN THE DISTRICT COURT

This is an action for treble damage and injunctive relief brought by petitioners ("Continental"), a family owned retail chain, against respondent ("Sylvania"), a TV manufacturer.[2] Starting in 1963 Sylvania

---

[2]In the district court Continental pressed claims both on antitrust and on state law tort grounds against Sylvania and John P. Maguire & Co., Inc. ("Maguire"), which financed merchandise sold by Sylvania to retailers. The jury (and trial judge) found for Continental on its antitrust claim against Sylvania, found for

sold TV sets to retail dealers, including Continental, only upon their agreement that they would not resell the merchandise except at store locations approved by Sylvania. Continental complied with that arrangement for a time, but ultimately insisted on its right to sell its own merchandise where it determined, and began to resell sets from a new store in Sacramento, despite the objection of Sylvania and Handy Andy, Sylvania's protected dealer there. Sylvania, in order to enforce its resale restriction, first took a series of predatory actions and then cut Continental off as a dealer entirely, at a time when, because of a national boom in demand and a shortage of supply of color TV sets, Continental could not obtain color sets elsewhere. On evidence supporting Continental's claim the trial judge, Justice Tom Clark, denied Sylvania's request for an open-ended rule of reason instruction and gave a *per se* instruction paraphrasing *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

On special interrogatories (Pet. App. 11-12, note 6), the jury found for Continental against Sylvania and assessed Continental's damages at $591,505. Thereafter, the court made findings consistent with and fully supported by the evidence and the jury verdict on special interrogatories. The court thereupon entered judgment on the verdict for treble the amount of damages assessed and granted injunctive relief.

Maguire on all claims, and for Sylvania on the tort claims. Continental's suit was initially filed as a cross-claim in a suit filed by Maguire against Continental for sums allegedly due on Continental's floor plan financing of Sylvania's merchandise. By stipulation, Continental's cross-claim was tried first. After the verdict was entered for Continental against Sylvania on the cross-claim, the parties stipulated to a judgment for Maguire on its contract claim in an amount substantially less than Maguire had initially asserted to be due.

Because the majority opinion in the Court of Appeals states the facts as though Sylvania, rather than Continental, had prevailed on the facts, it is appropriate to summarize the evidence heard by the trial judge and jury.

1. The evidence shows that Sylvania, at the demand of its Sacramento dealer, enforced its resale restriction to stamp out intrabrand competition in Sacramento.

a. *The purpose of Sylvania's resale restriction:* In discussing Sylvania's "elbow room" program the majority below persistently resorts to sanguine phrases such as "selective distribution" (Pet. App. 4), and "franchising by location". (Pet. App. 5) Nevertheless, the essence of Sylvania's "elbow room" resale restriction was very simple. As the majority opinion states:

> "There were agreements between Sylvania and its dealers that the dealers would not move Sylvania brand merchandise to a new unapproved location for resale without the prior approval of Sylvania." (Pet. App. 5-6)

Dealers, in order to buy Sylvania TV products, committed themselves not to resell except at store locations approved by Sylvania. (French: R.T.[3] 21-22, 23-7, 43-7, 56-61, 81-2, 84-7, 116, 119-21, 136-39, 165-67,

[3] "R.T." refers to the reporter's transcript of the trial proceedings in the district court. The page numbers are the pages in the original typed transcript. All testimony cited is printed in the joint appendix to this brief with reporter's transcript pagination appropriately indicated. The names used in these citations to the record (e.g., "French") are the names of the witnesses.

170-71, 250, 290-91; Hines: R.T. 1120, 1122-27; Carroll: R.T. 466-77, 500-01A, 504-506, 511-15; Morgan: R.T. 411-12, 418-24A; Sanford: R.T. 1994-97) See also Findings of Fact Nos. 7, 8, 13. (Pet. App. 119, 120, 123)

Despite the gratuitous assertion by the Court of Appeals that Sylvania tried to avoid anticompetitive practices (Pet. App. 6), the anticompetitive purpose for the elbow room resale restriction is candidly set forth by Sylvania in its sales manual. (Ex. F, R.T. 19, pp. 1 and 2, and Ex. C, R.T. 20, p. 2) In the manual, Sylvania states that its distribution policy:

> "create[s] 'elbow room' in a *sensible territory*" (Ex. F, R.T. 19, p. 1, line 8);
>
> "give[s] SUPER 'elbow room'" (Ex. C, R.T. 20, p. 2, line 21);
>
> "gives every Sylvania dealer a *geographic area* in which to sell . . . Sylvania products by franchising dealers *by territory* . . ." (Ex. F, R.T. 19, p. 2, line 23);
>
> "*eliminates* 'same brand competition'" (Ex. F, R.T. 19, p. 2, line 15 and p. 1, line 9); and
>
> "*eliminates vicious price cutting* and establishes suggested 'go' prices . . ." (Ex. F, R.T. 19, p. 2, lines 16-18) (emphasis added throughout)

The evidence is also overwhelming that the restrictive purposes announced in the manual were carried out in the administration of the program in Northern California generally (R.T. 290-91, 475-77, 484-85, 492, 497-98, 551-53) and in Sacramento specifically, the territory involved in this case. (R.T. 437-48, 536-41,

1122-27, 1150-51) Dealers were told that "same brand" competition was to be eliminated. (R.T. 1126) Even Sylvania's most reticent witness finally admitted that its purpose was to end what he termed "cut throat" competition among dealers reselling Sylvania's products. (R.T. 645-46)

b. *The effect of Sylvania's resale restriction:* Elbow room did eliminate intrabrand competition. By reason of the inherent limitations respecting advertising and promotion, delivery and service, the sales territory of a TV dealer is limited to a radius of between 25 and 50 miles from a location from which he is authorized to sell. (R.T. 255-57, 685-86, 1174, 1450-52) See Finding of Fact No. 8. (Pet. App. 120) Although the majority below states that the elbow room policy was administered so as to place "at least two" authorized dealers in every major metropolitan market (Pet. App. 6), the overwhelming evidence is that in Northern California—and specifically in Sacramento, the only market for which detailed evidence was introduced—the program was administered in a way that was devastating to intrabrand competition. (R.T. 475-77, 484-85, 492, 497-98, 536-41, 1122-27)

In 1961 and 1962, before the elbow room policy was applied, there were in Sacramento about 19 competing Sylvania dealers. (R.T. 1111-12) Elbow room was fully introduced in 1963. (R.T. 1112-13) In that year, the number of dealers was reduced from 19 to 5. (R.T. 524-26, 1113) By the middle of 1964 the phaseout of Sylvania's old distribution system was nearly complete and the number of Sacramento firms

to which Sylvania made sales had been reduced to 3. (R.T. 526, 1114-15) One of these three firms was not a retailer at all, but a firm engaged in selling and leasing TV's and other appliances to motels. (R.T. 524-25) The second of these three firms was a small retailer which was fully phased out in 1966, and to which Sylvania sold in 1964 only $325 worth of merchandise. (R.T. 1114-15) One dealer, Handy Andy, had as a practical matter the entire volume. (R.T. 1114-19) See Finding of Fact No. 16. (Pet. App. 126) and chart opposite page 35 of this brief, entitled "Sylvania dealer structure, Sacrament market, 1962-1966."

In the teeth of this evidence, the verdict, and the trial court's findings, the majority treats this case as though competition in the retail sale of Sylvania products had survived in Sacramento. Sacramento, a market area of more than 500,000 consumers (R.T. 520, 2004-06), was at that time, on a per capita basis, the richest color TV market in California. (R.T. 520-21) Yet, elbow room restrictions gave it entirely to Handy Andy and eliminated intrabrand competition in Sylvania products either from dealers other than Handy Andy already in that territory or from dealers like Continental who wanted to enter it with new investment from outside. With an unchallenged retail market (R.T. 526-33, 1185-86), Handy Andy's sales of Sylvania TV products exceeded 1 million dollars in 1965. (R.T. 526-27, 1117-18) See Finding of Fact No. 16 (Pet. App. 126) It was this particular market, at this particular point in its development,

which Continental wanted to enter by shipping some of its Sylvania sets to a store it had opened there. (R.T. 265-69, 1532-34)

c. *Elbow room enforcement against Continental:* Again ignoring both the jury verdict and the trial judge's findings, and the overwhelming evidence, the majority opinion below states that Sylvania cut Continental's credit and terminated Continental not because Continental moved merchandise to Sacramento for resale, but because Sylvania was uneasy about Continental's credit. (Pet. App. 9-10) Though evidence of that innocent explanation of its conduct was presented by Sylvania, the jury clearly rejected it and the trial judge specifically found that "none of [Sylvania's claimed] reasons were the grounds on which Sylvania acted." Finding of Fact No. 15 (Pet. App. 124-25)[4] The reason Sylvania acted, as shown by the evidence, and found by the trial judge, is as follows:

> "I find that the action of Sylvania set out in paragraph 14, supra, was taken pursuant to the contract, combination or conspiracy alleged by Continental and was part and parcel thereof and at the instance of Sylvania's co-conspirator Handy Andy; and as a result thereof Continental was prevented from selling its Sylvania brand products in its store in Sacramento. . . ." (Finding of Fact No. 16, Pet. App. 126)

---

[4]The predatory nature of Sylvania's action is clearly stated in the trial court's finding number 14. (Pet. App. 123-124)

The overwhelming evidence supporting the findings and verdict is of record and cannot be effaced. Continental, originally a small family business (R.T. 1424-39) whose rapid expansion had been encouraged by Sylvania (R.T. 70-72, 82-84, 1452-53, 1460-61, 1463-65) had become in 1964 one of Sylvania's largest and most successful dealers. (R.T. 148-49, 323-25, 891, 2682) It encountered problems only when, in 1965, it decided to display and sell some of its Sylvania products in the high-demand, non-competitive, Sacramento market. What occurred then can be summarized in sequence, as follows:

i. *Discussions about Sacramento prior to September 5, 1965:* In the spring of 1965 George Shahood, Continental's principal stockholder and manager of the chain, told Lee French, the Sylvania District Sales Manager for San Jose, that Continental was considering a store in Sacramento. (R.T. 248-51) French knew that under elbow room procedures Continental's sale there of Sylvania products required approval of the Sylvania District Sales Manager in that area, James Hines (R.T. 250); sometime thereafter French so notified Shahood. (R.T. 258-59) Following preliminary discussions between Shahood, French and Hines (R.T. 250-52, 1128-30, 1512-13), the matter was dormant until August, when Shahood told French that Continental had arranged to open a store in Sacramento in early September. (R.T. 257-58, 1531)

Disturbed, French repeatedly told Shahood this shouldn't be done without prior approval from Sylvania. (R.T. 258-59, 749-51) He complained to several Continental employees that he was "getting heat" from Batavia, Sylvania's corporate headquarters, to prevail on Continental not to enter the Sacramento market. (R.T. 751-53) At the beginning of September, shortly before the Sacramento store opened, French told Shahood once again that Sylvania sales there could not be approved. (R.T. 257-59, 1531-32)

ii. *The events of September 5, 1965:* On Sunday, September 5, 1965, the day before Labor Day, Shahood told French that Continental, despite lack of approval, had shipped some of its merchandise from its San Jose warehouse to Sacramento. (R.T. 264, 1532) French asserted that Shahood was being foolish, that he was jeopardizing Continental's entire relationship with Sylvania. (R.T. 265-69, 1532-34) Shahood urged French to try again to obtain Sylvania's permission. (R.T. 267, 1534) French thereupon telephoned Hines and told him what Continental had done. (R.T. 271-72) Hines told French that he doubted that anything could be worked out because of commitments to Handy Andy, the existing Sacramento dealer. (R.T. 272-74)

On that weekend, French also met with Calvin Savage, Continental's accountant. (R.T. 755-56) French told Savage that if Continental persisted "there won't be any more Continental TV" and Savage and other employees "will be out of a job." (R.T. 756) French said Savage was "really foolish to stick around" (R.T. 756) and, in fact arranged an employment interview for Savage with Continental's largest San Jose competitor. (R.T. 757-59)

iii. *The events of September 7, 1965 and immediately thereafter:* On the next business day, Tuesday, September 7, French called Sylvania's National Sales Manager, Ray Steiner, saying that Continental had Sylvania sets in Sacramento without approval from Hines. (R.T. 275) Steiner said he would check the matter and call French back; about two hours later Steiner did telephone French, told French that approval could not be worked out, and asked French what Continental was going to do with the merchandise. (R.T. 275-78) Immediately upon hearing from Steiner, French called Shahood. He informed Shahood that Sacramento approval was impossible (R.T. 279) and asked what Continental would do. (R.T. 1534-35)

Shahood—having talked with Continental's attorneys (R.T. 1534)—informed French that Continental had been advised that it was unlawful for Sylvania to dictate where Continental could sell and that Continental planned to keep the merchandise in Sacramento. (R.T. 279-80, 1534-35) At the time, Continental had pending two large orders for Sylvania merchandise (R.T. 237-38, 242-43) which had already been approved for credit and were waiting delivery. (R.T. 236-38, 242-43, 296, 977-78, 991-92, 1009-10, 1545) French threatened Shahood with the loss of these orders and said Continental would get nothing from Sylvania thereafter if it persisted. (R.T. 267-70, 1535-36) French then reported back to Steiner that Shahood had refused to remove his Sylvania merchandise from Sacramento. (R.T. 280-81)

Contrary to the Court of Appeals majority's statement that Sylvania acted out of concern about credit (Pet. App. 10), and consistent with the findings (Pet. App. 124-26) the record shows an attempt by Sylvania to camouflage as a credit decision what was in truth a decision by marketing executives to stop Continental from entering the Sacramento market. On September 7, the very day that Shahood told Sylvania that Continental insisted on its right to keep its merchandise in Sacramento, Hines, Sylvania's Sacramento area sales manager, informed Ken Lopolito, Sylvania's California Area Credit Supervisor, that Continental had Sylvania brand merchandise in Sacramento (R.T. 1012-13), expressed concern about Handy Andy, and demanded to know whether the Sylvania credit people could force Continental to get the merchandise out of Sacramento on the ground that it was "out of trust." (R.T. 1013-18, 1538-39; Ex. T, R.T. 1163) Lopolito informed Hines that there was no credit problem with Continental (R.T. 1017-18), but immediately thereafter called Thomas Rivers, his credit department superior at Sylvania's corporate headquarters, to report what had happened. (R.T. 1021) Rivers, upon being told what Continental had done, instructed Lopolito that Continental's previously approved and processed orders were not to be shipped. (R.T. 1021-28) The following day, Lopolito sent a wire to Rivers which clearly shows that Continental's orders were being held up not for credit reasons but because Continental had merchandise in Sacramento. The wire said:

"Please advise current situation regarding Continental TV and request for franchise (Sacramento) I have held last order pending hearing from you." (Ex. BV, R.T. 1026; R.T. 1024-26)

A day or so later Continental's Sacramento store opened for business; Hines went to the store, saw Continental's Sylvania merchandise on the floor, and demanded to know what Continental was doing with Sylvania merchandise in Sacramento, admitted that Keith Anderson of Handy Andy was "on the phone screaming to Batavia" (R.T. 431, 1538-39) and told Shahood that Continental could not have Sylvania merchandise in Sacramento. (R.T. 1538-39) Shahood would not budge; he told Hines the merchandise was for sale. (R.T. 1539)

iv. *Sylvania's reprisals for Continental's action:* Continental's decision brought prompt reprisal. Initially, French was ordered to have no further contact with Continental. (R.T. 280-82) This method—simply ceasing to call on a dealer—had on an earlier occasion been used successfully by French to confine the sales area of a dealer who, in violation of his agreement with Sylvania, had sold Sylvania merchandise in Berkeley *without Sylvania's* authority. (R.T. 283-91, 552-53) Lopolito, Sylvania's credit man in charge of California, received an identical, specific instruction: Do not talk to Continental. (R.T. 282-83, 1028-29)

After Continental's attorneys had written to Sylvania challenging the legality of Sylvania's conduct (Ex. EH, R.T. 1542-43, 1539-41A), French started contacting Continental again. (R.T. 1543) He repeat-

edly asserted that Shahood was being stupid and foolish, was jeopardizing his program with Sylvania, was jeopardizing Continental, and that he should withdraw from Sacramento. (R.T. 1543) Sylvania also refused to accept any further orders from Continental (Ex. X, R.T. 293, 291-93, 296-97), and continued to withhold shipment of Continental's July and August orders. (R.T. 977-78, 990-92, 1008-10, 1544-45, 1556) Although no credit question had previously been raised (R.T. 296, 1026-29), John Morgan—not a credit man, but Sylvania's Vice-President for Sales—instructed French—also in the sales line of command—to tell Shahood that the orders were being held for credit review. (R.T. 298, 1544) This step was taken, moreover, despite the fact that Sylvania had at the time no complaint about Continental's payment record (R.T. 981-96, 1003-08, 1018, 1509-11, 1522-24) or its credit position (Ex. BM, BN and BP, R.T. 1000; R.T. 996-1000; Ex. BR, BS and BT, R.T. 1004; R.T. 263-64, 1003-05), and despite the fact that Continental's July, August and September orders aggregating $255,500 (R.T. 388), had presented no credit difficulty. (R.T. 295-6, 977-78, 990-92, 1008-10, 1544-45) Indeed, Continental was then in the best financial condition of its history. (R.T. 1559-60; Ex. EG-1 through EG-10, R.T. 1560)[5]

[5]The Court of Appeals majority implies that Sylvania had concern about Continental's credit because Sylvania learned in 1965 that Shahood, a former Marine Officer, had a military conviction during his Korean War Service, many years before. (Pet. App. 9-10) But as the evidence showed, and Mr. Justice Clark specifically found, Shahood had himself in November 1964 voluntarily reported to Sylvania's sales and credit representatives that he had been convicted. Many months after these disclosures, but

Shortly thereafter, Lee Lockhard, Sylvania's Comptroller, notified Continental that its credit was cut from $350,000 to $50,000 (R.T. 1545-46), effectively cutting off Continental from further purchases. Lockhard also unilaterally abrogated the terms of an agreement which had been negotiated between Continental and Sylvania the previous June about how maturies were to be paid (Ex. BG, R.T. 966; R.T. 953-66, 1508-12) and instructed Maguire (which serviced Sylvania's program of floor plan financing (R.T. 1317-19, 2985-87)) that Maguire was no longer to grant Continental the 10 to 13 day clearance time for payments which Sylvania and Continental had agreed upon. (Ex. CA, R.T. 1549; R.T. 1545-49) On instructions from Sylvania, Maguire then made a demand on Continental for payment of sums asserted to be due, but demonstrably excessive.[6]

v. *Continental's resistance to the Sylvania attack and its consequences:* Faced with Sylvania's commer-

before Continental shipped merchandise to Sacramento, Sylvania increased Continental's credit line to $350,000 and solicited from Shahood a $220,000 order on credit. (Finding of Fact No. 15, Pet App. 124-125) Thus, the evidence amply supports the conclusion of the trial judge and the jury that credit concern was not the true reason Sylvania acted.

[6]See Finding of Fact No. 14. (Pet. App. 123-124) The demand was for immediate payment of $45,331.68. Maturities had been computed as of the date that merchandise had been shipped by rail from New York. (R.T. 1341) Actually Sylvania's sales manual stated that dealers were to be given four months free flooring "in the dealer's store" (Ex. G, R.T. 75; R.T. 73-75) and Continental, when it accepted the financing plan, had been so assured. (R.T. 327, 907-08, 985, 1452-55) (Indeed, Sylvania credit personnel knew that dealers were being told by Sylvania salesmen that dealers were entitled to display merchandise on their floor for 120 days before any charges began, and at some time after April, 1965, the Sylvania Area Credit Supervisor in California

cial aggression, Continental tried to defend itself. By wire and letters it put Sylvania on notice that it would not comply with the excessive payment demand, that it would not buckle under to unlawful efforts to curtail its markets, and that it stood ready to meet and negotiate. (Ex. CF, R.T. 1347; Ex. EM, R.T. 1350; Ex. EN, R.T. 1724; R.T. 1719-24) Sylvania thereupon requested Maguire to bring suit, repossess all Continental's Sylvania merchandise, attach Continental's bank accounts and (although no lien was even asserted on anything other than a portion of Continental's Sylvania inventory) cause the United States Marshals to close and padlock Continental's main store and its warehouse. (R.T. 1341-42, 1559-61)

Following repossession, Sylvania and Maguire executives convened. (R.T. 310-11) Lockhard, Sylvania's Comptroller, told all present to remember that this was Maguire action, not Sylvania action. (R.T. 311, 3255) Donald Pedlow, a Maguire executive, stated that the Marshals had been instructed by Maguire to treat Mr. Shahood as an ex-con (R.T. 312-313); in this context, the chaining and locking of three of Continental's properties was discussed. (R.T. 314-15) Pedlow re-

tried to induce Sylvania sales personnel not to pass on this information.) (R.T. 906-08) The demand was excessive also in two other respects: first, it demanded items which, under the June agreement, would not have been due for from seven to ten more days (Ex. EM, R.T. 1350; R.T. 1347-50); second, the sum demanded was computed without subtracting any but one of several off-setting credits which aggregated several thousand dollars, which were concededly due to Continental, and which Continental had been seeking for months to collect. (Ex. EM, R.T. 1350; R.T. 956-59, 987, 1005-06, 1347-50, 1724-25) Indeed, Continental was not paid these credits until, after this action was initiated, Continental brought suit in state court for collection. (R.T. 1725)

ported, moreover, that Continental's banking connections had probably been jeopardized (R.T. 315-16) and assured the group that since discounting consumer paper was the backbone of Continental's business, Continental was going to suffer. (R.T. 316)

Stressing urgency, Lockhard (in an obvious effort to injure Continental credit still further) then instructed an assistant that the Credit Manager of Philco (Sylvania's competitor, and Continental's other major supplier, which also advanced credit to Continental) should be immediately told about the actions taken against Continental that day. (R.T. 316-19) Finally, Sylvania absorbed shipping expense to sell Continental's repossessed merchandise, which had been taken from various locations throughout Northern California (R.T. 319), to Continental's largest San Jose competitor. (R.T. 319-22)

Sylvania's attack on Continental was an immense success. It came on the eve of the color TV boom (R.T. 36-38, 325-26, 454-57, 562-63, 1167-69, 1555-56, 2787-98), to which manufacturers responded by allocating sets to their existing dealers only. (R.T. 38, 454-57, 559-63, 1169-70) Continental, unable to obtain sets from other sources to replace the loss of its Sylvania allocation, was driven out of Sacramento, and forced to close down stores in Vallejo, Oakland, San Francisco, and Salinas, as well. (R.T. 1569)

2. Given the evidence reviewed above, the District Court properly gave a per se instruction based on the Schwinn rule.

In the trial court two issues were posed by the evidence and by the arguments of both parties to the

jury (R.T. 3338, 3378); first, whether Sylvania acted against Continental in reprisal for Continental's shipment of Sylvania sets to Sacramento for resale or because of credit concerns, and, second, whether Sylvania's elbow room restriction involved control over resale territories, as Continental contended, or merely a practice of franchising by location, as Sylvania asserted. It its instructions, the court told the jury that "Continental's specific claim" was that Sylvania entered into a contract, combination or conspiracy—

> *"the purpose and effect* of which was to establish and enforce a sales distribution policy restricting *the locations from which and territories in which* Sylvania dealers could resell . . ." (R.T. 3435) (emphasis added);

stated that Sylvania denied this contention (R.T. 3436); explained the general purpose of the Sherman Act (3441-42); emphasized that concerted action violates the act

> "when its purpose is, or likely effect will be to unreasonably restrain competition in the market place" (R.T. 3442);

and then accurately and fully paraphrased the language and holding of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), saying:

> "So, too, concerted action in the form of *dividing territories* in which a dealer may resell merchandise purchased from the manufacturer without resale price maintenance constitutes a violation of the antitrust laws. That is to say, where a manufacturer, by means of a contract, combination or conspiracy, *restricts the territories*

within which a dealer may resell merchandise purchased from the manufacturer, such a restriction is unlawful regardless of whether or not that restriction is good business practice from the manufacturer's point of view and is likely to assure adequate volume or profits. Any agreement, combination or conspiracy by which a manufacturer interferes with the ordinary and usual forces of competition to *restrict the territories* within which dealers may resell merchandise which they have purchased from the manufacturer or to *keep one dealer from competing for customers or sales in a territory or area served by another dealer* also constitutes a violation of the antitrust laws, whether or not the territories resulting seem reasonable or unreasonable.

"Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of Section 1 of the Sherman Act, regardless of the reasonableness of the location restrictions." (R.T. 3446-47) (emphasis added)

Further, the trial judge at Sylvania's request specifically instructed that:

"On the other hand, on this question of *territorial or customer restrictions,* you are instructed that a manufacturer, such as Sylvania, has a right, acting alone and independently for its own

business interests, to select its customers, and for this purpose, the manufacturer may grant an exclusive 'franchise' to certain dealers to whom, alone, he will sell his products. Also, it is lawful for the manufacturer to designate the location or locations of the place or places of business for which said dealer or dealers are franchised. It is also lawful for the manufacturer to decline or refuse to grant a dealer's request for a franchise at different or additional locations." (R.T. 3447-48) (emphasis added) (See Sylvania Instruction No. 30C, C.T. 1269)[7]

By answers to special interrogatories propounded by the court the jury found that Sylvania's resale restriction constituted a contract, combination, or con-

---

[7]By contrast, the instructions requested by Sylvania and denied by the court would have instructed (erroneously) that arrangements to confine resale areas are governed by the rule of reason and, in addition would have told the jury: that even "eliminating all competition among Sylvania dealers" could be "outweighed by benefits" (C.T. 1161); that "reducing, but not eliminating [such] competition" would "tend to show" reasonableness (C.T. 1161); that while "substantial lessening of the number of television outlets and brands available," would "tend to support a finding of unreasonable restraint" (C.T. 1162), even then "a showing that the practice was adopted to serve legitimate business purposes, and particularly to increase Sylvania's strength as a competitor" would "support a finding that Continental had not proved an unreasonable restraint" (C.T. 1163); and that "it is not enough for Continental to show simply a substantial restriction, if any there be, on competition in the sale of Sylvania television products," but that it must show "general competition in [markets] "for television products as a whole (that is to say, all brands) was unreasonably restrained." (C.T. 1272) [*Note:* The citation "C.T." refers to the district court clerk's transcript of pleadings, motions, requests and other items docketed in the proceedings. The page numbers are the pages in the clerk's transcript. All material cited from the clerk's transcript is printed in the joint appendix with the clerk's transcript pagination appropriately indicated.]

spiracy in restraint of trade in violation of the anti-trust laws and that Continental sustained $591,505 in damage to its business or property as a proximate result of that violation.

3. On Continental's claim for equitable relief the trial judge made findings of fact favorable to Continental and granted limited relief.

After the jury verdict, Mr. Justice Clark, who presided at the trial, made findings of fact and entered conclusions of law as a predicate to injunctive relief. (Pet. App. 115-29) Like the jury, the trial court specifically rejected Sylvania's factual claim that it acted against Continental for credit reasons and specifically found that Sylvania acted with the purpose and effect of keeping Continental from competing with Handy Andy in the Sacramento market. (Findings of Fact Nos. 14-16, Pet. App. 123-26)[8]

PROCEEDINGS IN THE COURT OF APPEALS

The judgment entered for Continental in the district court was affirmed, two to one, by a three-judge

[8]In footnote 7 of its opinion (Pet. App. 13) the majority of the Court of Appeals suggests the possibility that the trial court finding that Maguire sued Continental at Sylvania's request as part of the unlawful conspiracy may be inconsistent with the jury's finding that Maguire was not party to the unlawful conspiracy. No conflict exists. There was abundant evidence of conspiracy: dealers agreed to be bound by the resale restriction, and Handy Andy conspired with Sylvania to enforce the restriction by driving Continental out. Indeed, it is the latter conspiracy the trial judge explicitly found. There is nothing inconsistent or anomalous in a finding that Maguire, though not a part of the conspiracy, was told by Sylvania to sue as part of Sylvania's action to carry out the conspiracy.

panel in the Court of Appeals. Rehearing en banc was granted and the panel opinion withdrawn. A sharply divided Court of Appeals ultimately reversed the district court by a seven to four vote. The majority, in a lengthy opinion by Judge Ely (Pet. App. 1-54), held that "the legality of the locations clauses here involved should be judged under what is commonly referred to as the 'rule of reason', rather than a rule of *per se* illegality." (Pet. App. 17) The majority distinguished *Schwinn* on the ground that "Schwinn's territorial restrictions . . . prevented a dealer from competing for customers outside his territory," whereas "Sylvania's dealers could sell to customers from any area, could advertise in any area, and were limited only as to the location of the franchisee's place of business." (Pet. App. 20-21) The majority found in some lower court cases a basis for doubting whether this Court was, in *Schwinn,* "establishing a *per se* rule against all vertical territorial restraints." (Pet. App. 33) It criticized the trial judge because he "chose to apply, literally, the . . . sweeping language" of *Schwinn.* (Pet. App. 17-18) Perceiving a distinction between the restraints in *Schwinn* which restricted resale territories and those used by Sylvania which restricted the store location where resales could be made, the majority held that it was wrong to instruct in terms of *Schwinn,* despite the clear evidence and findings of a purpose and effect to exclude Continental from Handy Andy's protected Sacramento territory. The majority limited *Schwinn's* application to territorial restraints which "absolutely

prohibited a dealer from selling to purchasers outside of a certain area." (Pet. App. 24) Even on facts like those here, the *Schwinn* rule, it held, must be kept a secret from the jury. The court below therefore entered its order reversing and remanding the case for further proceedings not inconsistent with the majority opinion. (Pet. App. 53-54)

Judges Kilkenny, Browning, Duniway and Wright dissented from that disposition and opinion. Judge Kilkenney's opinion (Pet. App. 54-86), concurred in by Judges Browning and Wright and in this part by Judge Duniway, called the majority's factual distinctions from *Schwinn* "insignificant" and stated that the district court "simply took the holdings of *Schwinn* at face value and applied it to a set of facts which it logically encompasses." (Pet. App. 65) The dissenters labelled the majority's views as "impossible to reconcile with the jury verdict and the district court's findings of fact, which establish that the location clause operated as a territorial restraint." (Pet. App. 66) The dissenters read *Schwinn* to:

> "outlaw any and all territorial restrictions on resale to others. This necessarily includes all devices, the inevitable practical effect of which is to restrict a retailer's territory. We are convinced that Sylvania-type location clauses and *Schwinn*-type territorial restrictions are identical in effect and are both *per se* illegal under the command of *Schwinn*." (Pet. App. 68)

Judge Browning also wrote a telling dissent showing that major purposes of the Sherman Act

would be frustrated by the majority position. (Pet. App. 87-113) Judge Duniway wrote a brief opinion putting his dissent solely on the ground that *Schwinn* controls this case. (Pet. App. 114) Chief Judge Chambers wrote a brief opinion concurring in the judgment of the majority but dissenting from the number of words used to reach it and criticizing the majority for relying on law review comments about this very case. (Pet. App. 86-87)

SUMMARY OF ARGUMENT

1. The evidence heard by the jury and trial judge permitted only two conceivable factual conclusions: either Sylvania acted against Continental for credit reasons (as Sylvania claimed) or (as the overwhelming evidence indicated and the judge and jury found) Sylvania, at the instigation of its protected dealer, Handy Andy, enforced its resale restriction against Continental to stop Continental from shipping merchandise to Sacramento and reselling it there. On that evidence the instruction based on *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), was plainly correct. The factual distinctions attempted by the majority below between this case and *Schwinn* do not withstand analysis. The same purposes and effects can be achieved by a resale restriction in the *Schwinn* form or the Sylvania form. That conclusion is reinforced when the restrictions *Schwinn* used at the retail level are taken into account.

2. Sylvania's Sacramento conduct collides with every policy underlying the *Schwinn per se* rule. By stamping out intrabrand competition in the Sacramento territory, Sylvania freed Handy Andy both from price competition and from service and facilities competition from other Sylvania dealers. The restraint also deprived Continental of the power to make uncoerced decisions about where and to whom it would sell its own merchandise. The economic evidence submitted to the jury, and Sylvania submitted all that it desired, shows that it is impossible to tell whether conceded elimination of intrabrand competition in fact has off-setting pro-competitive interbrand effects. To submit to a jury the question whether speculative benefits to interbrand competition might outweigh these deliberate injuries to intrabrand competition would violate the holding in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). To require the jury to struggle with such a nonjusticiable issue, would enhance the risk of irrational or invidious decisions. Such a course, moreover, would substitute vagueness for reasonable certainty in an area of the law affecting all who buy and sell merchandise, and would threaten the federal courts with substantial increases in unmanageable litigation.

3. Decisions upholding exclusive dealerships and location franchises do not support the majority's result. These and like arrangements (such as primary responsibility clauses) do not stop any dealer from reselling where he chooses, or from providing intrabrand competition where the opportunity seems good.

The real significance of cases upholding exclusive dealerships, location franchises, and like arrangements, is that these cases show that all legitimate goals of a manufacturer can be met by lawful arrangements which are far less restrictive than territorial resale restraints.

4. The theory underlying the majority's decision is that economic "justifications have been offered for vertically imposed territorial restraints" which must be considered by the trier of fact. (Pet. App. 49, note 37) While recognizing that economists are in dispute about the effects of vertical territorial restraints, the majority relies on those economists whose views were rejected in *Schwinn*. None of those commentators draw a principled distinction between restraints in the *Schwinn* form and restraints in the Sylvania form. Indeed, economists on both sides of the debate about vertical resale restrictions regard resale price restraints and resale territorial restraints as essentially the same phenomenon. Thus, to accept the economic theory of the majority is not only to reject *Schwinn* but is to reject also the *per se* rule against resale price fixing, a rule unchallenged since *Dr. Miles Co. v. John D. Parke & Sons Co.*, 200 U.S. 373 (1911) and which Congress expanded when it repealed the fair trade exemption. (Public Law 94-145, December 12, 1975)

5. The majority's economic theory is at war with the concept embodied in the Sherman Act. That Act rejects the manufacturer's vision of an "orderly" resale market in which the manufacturer makes all

decisions about the prices at which, places at which and persons to whom a dealer may resell. The Sherman Act insists that resources be allocated by the interacting decisions of numerous buyers and numerous sellers in a competitive market. This requirement applies to retail trade as much as to any other segment of the economy.

6. Sylvania is not entitled to a "failing company" defense. Sylvania, a wholly owned subsidiary of General Telephone & Electronics (and now a division of G.T.E. Sylvania) was neither weak financially nor failing in its TV business in 1962 when it instituted restrictions on its dealer's resale areas. Sylvania introduced no credible evidence that it was necessary to impose such resale restraints in order to remain in business in competition with other manufacturers. Sylvania's only "justification" evidence—that it was dissatisfied with its market share in early 1962—was inadequate as a matter of law, as was its proposed instruction based thereon. There was no evidence that Sylvania even attempted to utilize less restrictive lawful alternatives. To the contrary, Sylvania concededly continued to use the same dealer resale restrictions long after its profits had more than trebled.

7. Nor can Sylvania, in imposing dealer resale restrictions, claim to have relied to its detriment on a "clearly declared judicial doctrine" that was thereafter reversed. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). No judicial doctrine existed in 1962, or at any other time, immunizing vertically imposed resale restrictions from

the application of the antitrust laws. To the contrary, the history of antitrust development in this area beginning as early as 1948 clearly indicated that *per se* illegality would likely be visited on a manufacturer which enforced dealer restrictions on resale areas or customers. Further, Sylvania did not in fact rely on any supposed legal doctrine of "lawfulness" in administering such dealer restrictions. Not only did Sylvania fail to present any evidence of such reliance, it admittedly continued to enforce such dealer resale restrictions for many years after the *Schwinn* doctrine was announced by this Court.

ARGUMENT

I. AS ENFORCED IN SACRAMENTO, SYLVANIA'S ELBOW ROOM POLICY WAS A CLEAR VIOLATION OF THE SCHWINN PER SE RULE. THEREFORE, THE INSTRUCTION GIVEN WAS CORRECT.

A. The Trivial Distinctions in Form Between the Way Sylvania Stamped Out Intrabrand Competition in Sacramento and the Way Schwinn Achieved its Similar Purpose Should Not Enable Sylvania to Evade the Schwinn Per Se Rule.

On the evidence that Sylvania's elbow room resale restriction was deliberately used to stamp out intrabrand competition in Sacramento, the trial judge instructed in terms of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 65 (1967). That instruction was plainly correct. *Schwinn* declares:

> "Under the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted

> with dominion over it. . . . Such restraints are so obviously destructive of competition that their mere existence is enough." (388 U.S. at 379)

Nothing in this Court's holding or language remotely suggests that the rule thus announced is a mere matter of form. Cf. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) This Court approached the question whether vertical restrictions on resale areas were *per se* unlawful with care and deliberation. The issue was first considered in *White Motor Co. v. United States*, 372 U.S. 253 (1963), following a long period during which the government had been successfully enjoining such restraints in case after case by consent decree.[9] In *White Motor* the Court left open whether or not a *per se* rule ought to govern.[10] Four years later, after wide ranging argument, and over pointed dissent, the issue was decided in *Schwinn*. If *stare decisis* means anything, the rule there announced cannot be evaded by a simple manipulation that imposes a resale restriction on store locations when the purpose and effect is to keep one dealer from selling in the same territory as another. Other courts of appeal have, of course, viewed the *Schwinn* rule as one of substance

[9]Apparently the first of those decrees was that entered in *United States v. Libby Owens Ford Glass Co.*, 1948-49 CCH Trade Cases ¶ 62,323 (N.D. Ohio 1948). Sixteen or more such decrees were entered between 1948 and 1963. See Stewart *Franchise or Protected Territory Distribution*, 8 Antitrust Bull. 447, 470 n.51 (1963).

[10]On remand, the defendant in *White Motor* signed without trial the form of consent decree forbidding resale area restrictions to which numerous other defendants had previously agreed. See *United States v. White Motor Co.*, 1964 CCH Trade Cases ¶ 71,195 (N.D. Ohio 1964).

to be invoked, whenever, in reason, it is applicable. E.g., *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 899-901 (5th Cir. 1973); *Reed Brothers, Inc. v. Monsanto Company*, 525 F.2d 486, 500 (8th Cir. 1975), *cert. denied*, 46 L.Ed.2d 645 (U.S. S.Ct., 1976); *Copper Liquor Inc. v. Adolph Coors Co.*, 506 F.2d 934, *rehearing denied*, 509 F.2d 758 (5th Cir. 1975); *United States v. Glaxo Group Ltd.*, 302 F.Supp. 1 (D.D.C. 1969), rev'd on other grounds, 410 U.S. 52 (1973); *Interphoto Corp. v. Minolta Corp.*, 417 F.2d 621, 622 (2nd Cir. 1969); *Eastex Aviation, Inc. v. The Sperry & Hutchinson Co.*, 522 F.2d 1299 (5th Cir. 1975).

The majority below purported to distinguish *Schwinn* by saying that a territorial restraint in the form used in *Schwinn* keeps each protected reseller "absolutely isolated from all [same brand] competition," whereas a restraint in the form used by Sylvania allows each dealer to reach customers outside his assigned market. (Pet. App. 21) This assertion is demonstrably false. A restriction in either the *Schwinn* or the Sylvania form can be used to stifle intrabrand competition completely, as Sylvania in fact did in Sacramento. If, for example, a manufacturer wants one of its dealers to sell only in Washington, D.C. and another to sell only in Baltimore, it can achieve that goal either with the *Schwinn* form of restraint or with the Sylvania form. Assigning a Baltimore territory to one dealer and a Washington territory to the other is the *Schwinn* way to do it; assigning a Baltimore store location to one dealer and a Washington store location to the other is the

Sylvania method. In both instances there is a wholly theoretical possibility for the dealer in one of the markets to reach customers in the other market by newspaper advertising within the other territory, phone calls to potential customers there, and the like. But in neither instance is there any realistic opportunity for either dealer to compete with the other.

Nor can Sylvania's conduct in Sacramento be distinguished from *Schwinn* on the ground that in markets other than Sacramento Sylvania may have tolerated more than one dealer. For that matter, if a manufacturer were permitted, contrary to *Schwinn,* to substitute its judgment for that of the market, the manufacturer could use either the *Schwinn* or the Sylvania form of restraint to manage resale competition at whatever level it elected. If it wanted two dealers in Washington, D.C., for example, it could assign to one the territory east of 12th Street and to the other the territory west of 12th Street; that is the *Schwinn* form of restraint. Alternatively, it could approve for one dealer a store location east of 12th Street and for the other a store location west of 12th Street; that uses the Sylvania form to achieve the same result. The vice in what *Schwinn* and Sylvania did is not in the form, but in the fact that the manufacturer's hand, rather than the unseen hand of the market, is at the competition throttle.

The whimsy involved in the distinction drawn by the majority below is demonstrated further when another aspect of the *Schwinn* case is considered. *Schwinn* involved two tiers of distribution. At the

wholesale level distributors (who sold Schwinn bikes to retailers) were assigned designated territories. But this was not the only restraint. This Court also struck down two related resale restrictions, one of which prevented distributors (even within their territories) from selling to retailers other than those whom *Schwinn* had "franchised only as to a designated location or locations" (338 U.S. at 370), and the other of which prevented retailers (who were franchised only at specified locations) from reselling except at retail (or to another franchised retailer). Thus, retailers in *Schwinn* were not given territories set off by metes and bounds. The retail restrictions held invalid there confined retailers in essentially the same manner as do Sylvania's elbow room restrictions here. The majority's statement that "Schwinn prevented a dealer from competing for customers outside his territory" while a Sylvania dealer could "sell to customers from any area, [and] could advertise in any area" (Pet. App. 20-21) simply misreads the *Schwinn* facts and ignores the evidence, verdict and findings in this case. Schwinn retailers (like Sylvania's) were simply told the locations from which they could conduct business. They, like Continental, were theoretically free to sell to any customer anywhere. so long as they did not sell through unfranchised outlets; and, Continental, like *Schwinn* dealers, had *only* theoretical freedom to do so. Neither could transcend the inherent limits of their store locations.

Picture, for example, a Schwinn retail dealer franchised for a location in San Francisco; such a dealer

would *not* violate *Schwinn's* restrictions if he advertised in Sacramento, took phone orders from there, or otherwise succeeded in exercising his theoretical right to make sales to customers there. His position would be like that of Continental under Sylvania's elbow room restriction. Both, while actually confined to a radius around a San Francisco store, would have a theoretical right to sell to customers in Sacramento, Chicago or anywhere else. Because putting retailers under wraps in this manner dampens intrabrand competition, as did the alternative form of restraint on wholesalers, this Court in *Schwinn* ordered the decree extended:

> "The principle is, of course, equally applicable to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement, or understanding limiting the retailer's freedom as to where and to whom it will resell the products." (388 U.S. at 378)

This language can mean only one thing: retailers, like wholesalers, must be left free to compete.

In finding a distinction where none of substance exists the majority below proceeded as though the vice in the *Schwinn* resale restriction was in its form. But as demonstrated, the difference in the form is scarcely worth mentioning, let alone sufficient to form the basis of a crucial Sherman Act distinction. The real vice of a restraint on resale areas lies in its purpose and effect. In any form, such a restraint replaces the numerous judgments properly reserved to merchants, allowing the manufacturer to preempt for itself the

SYLVANIA DEALER STRUCTURE
SACRAMENTO MARKET
1962-1966

DEALERS	1962	1963	1964	1965	1966	1967
Handy Andy		$96,615	$245,619	$838,505		
J. W. Brewer		58,502	34,467[1/]	11,290[3/]		
Tri-State Sales			535[2/]	327[4/]		
N. Amer. Appliance		6,417				
N. Sacramento TV		1,623				
Sacramento Employ. Enterprise						
Raley's Drug Center						
Petzwal's						
A & A Key Builders & Supp.						
Statewide Appliances						
Market Radio Store						
Bob's Appliance Sales						
Hery's TV						
Empire TV						
Genco TV						
Payless Factory TV						
Ulmer's TV Service						
Bomah Sales Co.						
Joseph's Radio & TV						

1/Entire Purchase Shipped to Brewer's non-Sacramento stores; no part of the shipment was resold within the Sacramento market.
2/Only one color set purchased.
3/One color set purchased; total shipment resold outside the Sacramento market.
4/No color sets purchased.

[Source: Ex. FX, R.T. 1925-26]

merchant's right to decide where and how he will sell his merchandise. Thus, the *Schwinn* rule surely applies in full vigor where, as in Sacramento, Sylvania enforced its restraint on resale areas to stamp out intrabrand competition entirely.

Other factual distinctions discerned by the majority below are no more availing. Its statement that Sylvania had at least two dealers in each metropolitan market (Pet. App. 6) is factually wrong as to Sacramento[11] and, in any event, does not distinguish *Schwinn;* the defendant there also franchised by location at the retail level (388 U.S. at 370) and no doubt authorized two or more retailers in many metropolitan areas. The majority's statement that no Sylvania dealer had a veto right over the grant of a location to another dealer (Pet. App. 46) is obviously wrong; Sylvania denied Continental a Sacramento location on the demand of its protected dealer, Handy Andy. (Finding of Fact No. 16, Pet. App. 126) Its assertion that *Schwinn* restricted vendees while Sylvania restricted vendors is also fallacious and irrelevant. Whatever the differences in form (and at the retail level even these virtually vanish), both Schwinn and Sylvania effectively restricted their buyers as to where and to whom they could resell.

The last factual distinction relied on by the majority is that Sylvania had a smaller market share than

---

[11]Handy Andy, Sylvania's protected dealer in Sacramento, had virtually the entire Sylvania market in 1964 and thereafter. See the chart opposite, entitled "Sylvania Dealer Structure, Sacramento Market, 1962-1966".

Schwinn. But this distinction ignores that the *Schwinn* case announces a *per se* rule. One of the purposes of that rule is to make it unnecessary to evaluate and assess structural and other economic evidence before striking down a blatantly anticompetitive practice. Despite minor differences, the justification pressed by both Schwinn and Sylvania is essentially the same — that the resale restrictions may help a small firm compete against large ones. This Court rejected that justification in *Schwinn:*

> "Schwinn contends, however, and the trial court found, that the reasons which induced it to adopt the challenged distribution program were to enable it and the small, independent merchants that made up its chain of distribution to compete more effectively in the market place. Schwinn sought a better way of distributing its product: a method which would promote sales, increase stability of its distributor and dealer outlets, and augment profits. But this argument, appealing as it is, is not enough to avoid the Sherman Act proscription; . . ." (388 U.S. at 374-375)

That rejected argument, moreover, comes in better grace from Schwinn than it does from Sylvania, for Sylvania hardly qualifies for any list of small firms.[12]

[12]The elbow room restrictions were initiated in 1962. It was stipulated that Sylvania profits from all operations ran in excess of $24 million in 1960, $8½ million in 1961, $17 million in 1962, $40 million in 1965, and $84 million in 1966. (R.T. 2614-17) The doubling of profits between 1965 and 1966 was due, in substantial degree, to increased demand for color TV. (R.T. 2616-17)

B. The Policies Supporting the Schwinn Per Se Rule Are Fully Applicable Here.

Not only are the *Schwinn* restraints indistinguishable on the salient facts from those Sylvania used in Sacramento, it is also clear that Sylvania's Sacramento adventure ran roughshod over every policy the *Schwinn* rule is intended to advance. The primary reason for *Schwinn's per se* prohibition is that when a manufacturer confines resale areas it deprives the public of the benefits of intrabrand competition. As in Sacramento, customers for the brand are limited to a single source. In an age of product differentiation and massive advertising of consumer goods — where each brand seeks to attract its own following, to become, as it were, a market in and of itself — the resulting harm to competition can be severe. A half million Sacramento buyers, who were spending a million dollars a year on Sylvania merchandise, had only one dealer to whom they could turn. These buyers lost the advantage of intrabrand price competition just as surely as if Sylvania had fixed resale prices in violation of the rule in *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911). Though Sylvania did not use a *Dr. Miles* type of restriction, by keeping all dealers save one out of Sacramento it achieved the same effect. There can be no intrabrand price competition in a market where only one dealer can sell the brand.

Furthermore, a restriction confining resale areas can be far worse than a resale price restriction. Harmful though it would be, a resale price restriction

would not have precluded other Sylvania dealers from entering Sacramento. Though no price competition would occur, buyers would at least have gotten the benefit of competition in the form of better service and facilities (so-called "enterprise competition"). By contrast, the way Sylvania applied its elbow room restriction dealers other than Handy Andy were kept out of Sacramento entirely. Sacramento consumers lost the benefit of both price and "enterprise competition". Consumers not only paid whatever price Handy Andy (free of the competitive spur from any other Sylvania dealer) decided to charge, they got whatever level of service and amenity Handy Andy (free of the competitive spur from any other Sylvania dealer) decided to provide to them. These effects are most harmful, no doubt, where, as here, the impetus for enforcement against one dealer comes from another dealer. *White Motor Co. v. United States,* 372 U.S. 253, 267 (1963) (Justice Brennan concurring). But as *Schwinn* holds and *Dr. Miles* implies, enforcement of such restrictions foreclose resale competition even where the manufacturer takes the initiative.

Assuring to buyers the benefits of a competitive market is not the only goal of the *Schwinn* rule. An important social goal of the Sherman Act is also embodied in *Schwinn.* Independent small businessmen who have made an investment of capital, energy and hope in their own enterprises, ought to be able to make their own crucial decisions as to where to sell and what price to charge for their own merchandise, free of coercion, collusion and exclusionary practices.

That is what the free enterprise system, which the Sherman Act protects, is basically about. This Court has consistently supported that goal of commercial freedom. *United States v. A. Schrader's Son, Inc.,* 252 U.S. 85, 100 (1920); *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4-5 (1958); *Brown Shoe Co. v. United States,* 370 U.S. 294, 344 (1962); *Simpson v. Union Oil Co.,* 377 U.S. 13, 19 (1964). Sylvania, in Sacramento, displayed consummate contempt for this Sherman Act goal. If Sylvania's Sacramento conduct does not invoke the *per se* rule of *Schwinn,* neither Sylvania nor any other large firm need in the future doubt its ability to effectively throttle any small buyer with which it deals.

Furthermore, to apply the rule of reason to a case where the manufacturer stamped out same-brand competition would undercut this Court's settled view about the alternative roles of the courts and the legislature in antitrust administration. The interests which this Court has evinced when it has addressed these matters are related to the purpose and effect of the restraint, not to its mere form. A *per se* rule, ". . . avoids the necessity for an incredibly complicated and prolonged economic investigation . . . —an inquiry so often wholly fruitless when undertaken." *Northern Pacific Railway v. United States,* 356 U.S. 1, 5 (1958). As this Court recently held in *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972), where, as here, a restraint has been imposed on intrabrand competition, the Court should not set sail on a sea of speculation in a prophetic effort to tell

whether the resulting injury is offset by asserted benefits to interbrand competition:

> "Our inability to weigh in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules . . ." (405 U.S. at 609-610) . . .
>
> ". . . If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that must be made by Congress and not by private forces or by the courts." (405 U.S. at 611).

The majority tries to distinguish *Topco,* saying it stands only for a truism—that the rule of reason does not apply to allow proof of benefits in another market once a *per se* violation is clearly established. (Pet. App. 29, note 21) But the very question this Court addressed in *Topco* was whether or not a *per se* rule did apply to the restraint imposed by *Topco.* The language quoted above gives "one important reason" for holding the *per se* rule applicable, and, of course, it is equally applicable here. See also *United States v. Philadelphia National Bank,* 374 U.S. 321, 371 (1963).

Congress has already shown that it can deal with issues that *Topco* assigns to it. In the last Congress both branches considered bills granting an antitrust exemption for territorial arrangements in the soft drink industry. See H.R. 6084, S. 3421, and Senate Report No. 94-1195. (August 31, 1976) These bills, which carved out limited exceptions to rules an-

nounced by this Court, failed of passage. By contrast, Congress recently enacted legislation abolishing the fair trade resale price fixing exemption (Public Law 94-145, December 12, 1975) and passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976. (Public Law 94-435, September 30, 1976) Far from being disposed to relax the rules against vertical restraints, Congress seems intent on strengthening antitrust enforcement in such area.

Finally, the *per se* rule of *Schwinn* has important collateral advantages. There are about half a million franchised businesses in this country.[13] Attorneys advising these firms ought to be able to tell them which restraints are lawful and which are not, without engaging economists to do elaborate rule of reason analyses of an entire industry—elaborate exercises, which, in the end, would leave the matter in serious doubt. Moreover, the potential for dispute would be enormous if the question of legality were unclear. If even a small percentage of these myriad arrangements have to be litigated under an open ended rule of reason, the federal courts could be inundated. There are many less restrictive ways in which a manufacturer may protect its own business interests by contract with dealers. (See part II, *infra*) Thus far, clear, bright lines have been drawn between those restraints which are unlawful and those which are not. Restraints on resale areas, customers and prices, which harm the

[13] In 1972 the figure, by one count, was 445,281. United States Department of Commerce, Franchising in the Economy 1972-1974 (1974).

consumer and seriously inhibit dealer freedom are unlawful. Less restrictive arrangements, such as exclusive distributorships, location franchises, and other arrangements discussed in Part II, *infra*, are lawful unless used to achieve anticompetitive ends. These settled distinctions between what is presumptively lawful and what is *per se* unlawful in distribution arrangements strike an appropriate balance between the interests of manufacturers and those of their dealers. Only these settled distinctions can provide the certainty needed in commercial matters, reduce the private and public costs of excessive disputes and complex litigation, and reduce the risk that jurors, facing unfathomable economic complexity, will respond to manufacturer-dealer litigation on emotional or invidious grounds.

II. CASES UPHOLDING EXCLUSIVE DEALERSHIPS, LOCATION CLAUSES AND COMPARABLE ARRANGEMENTS INVOLVING NO RESALE RESTRICTIONS DO NOT IMPLY THAT A MANUFACTURER MAY FORBID ONE DEALER FROM SHIPPING HIS MERCHANDISE INTO ANOTHER DEALER'S AREA FOR RESALE.

The majority below relied heavily on the numerous cases upholding the legality of exclusive dealerships. (Pet. App. 37-44)[14] Reasoning from cases like *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396

[14]The exclusive dealership cases are not directly involved here. Sylvania makes a point of the fact that it gave no exclusives. (R.T. 182-83, 423, 646-47, 2522, 2550, 2595-96) Furthermore, Justice Clark instructed that Sylvania could lawfully grant exclusive franchises. (R.T. 3447-48)

U.S. 1062, rehearing denied, 397 U.S. 1003 (1970), the majority makes two arguments: (1) that Sylvania's resale restriction has the same market effect as exclusive dealerships, which are lawful, and thus ought to be lawful too (Pet. App. 37); and (2) that resale restrictions like those Sylvania uses may be necessary to make exclusive dealerships effective, and therefore should be lawful. (Pet. App. 38-43)

The syllogism in the first argument is flawed. There is a vast difference between the market impact of a resale restriction which keeps one dealer from selling in another's area and the market impact of an exclusive dealership. By such a resale restriction the manufacturer keeps the dealer out of areas other than where it wants him—the manufacturer, all the while, remaining free to sell to any other dealer anywhere. Without the investment and risk of forward integration, the manufacturer appropriates control over one of the most crucial competitive decisions any truly independent trader must make—where he will sell his wares. (Pet. App. 77, Kilkenny, J. dissenting) In an exclusive dealership, by contrast, the restriction is not on the dealer, but on the manufacturer. In order to induce the dealer to handle his product the manufacturer gives assurance that the *manufacturer* will not, in the dealer's area, sell to others. See Rifkind, *Division of Territories*, in Van Cise and Dunn, *How to Comply With The Antitrust Laws*, 127, 134-35 (1954).

The second type of arrangement (where the manufacturer limits himself) is valid if reasonable. *Seagram & Sons, Inc. v. Hawaiian Oke Liquors*, 416

F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062, rehearing denied, 397 U.S. 1003 (1970) The first type of arrangement (where the manufacturer restricts the dealer and thereby exercises control at two levels of distribution), far from being similar to the first, is "at the other extreme" from it. This Court in *Schwinn,* upon holding invalid *per se* a restraint on the dealer, distinguished exclusive dealerships in just those terms:

> "At the other extreme, a manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. . . . If the restraint stops at that point—if nothing more is involved than vertical *'confinement' of the manufacturer's own* sales . . . [it] would not violate the Sherman Act." (388 U.S. at 376 (emphasis added)

It is only by denying this contrast between resale restrictions (which, as in *Schwinn,* put the dealer under wraps) and exclusive dealerships (which confine only the manufacturer's own sales) that the majority below can find aid in the long list of exclusive dealership cases it cites.

The second "exclusives" argument made by the majority (Pet. App. 38-43) is weaker still. The premise is that when a manufacturer does limit his own sales by granting exclusive dealerships (as Sylvania did not) he must be allowed to confine dealer resale areas in order to keep each dealer out of the exclusive territory of others. *Schwinn,* of course, commands otherwise. The *Schwinn per se* rule gets priority over

the "valid if reasonable rule" applied to exclusives; a manufacturer may respect the exclusive he has granted by refusing to sell to a dealer except in that dealer's territory, but after delivery of title to merchandise to such dealer within his territory the manufacturer cannot forbid the dealer to ship it elsewhere for resale. Cf. *Interphoto Corp. v. Minolta Corp.,* 417 F.2d 621 (2d Cir. 1969); *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 900 (5th Cir. 1973). This, indeed, is essential; otherwise the rule about exclusives would destroy the *Schwinn per se* rule.

But even if the majority's contrary legal premise were right, its reasoning would on this record not support its result. As the majority itself notes (Pet. App. 6), and as the record demonstrates, Sylvania granted no exclusive dealerships. (R.T. 182-83, 423, 646-47, 2522, 2550, 2595-96) The concept the majority below presses is an ancillary one. Compare *United States v. Addyston Pipe & Steel Co.,* 85 F. 271 (6th Cir. 1898), aff'd 175 U.S. 211 (1899). The majority urges that a territorial resale restraint, though *per se* unlawful, becomes valid where used in aid of an otherwise valid exclusive dealership. Even giving the argument full scope, the invalid resale restraint surely does not become valid when, as here, it *is being used alone* and for its own sake. To hold otherwise is like arguing from the fact that a trader selling his business may grant a covenant not to compete to the conclusion that the same covenant could be given where he is not selling his business. The majority's

ancillary argument is an appendage in the air, with no base to support it. To credit the contention would be to reject *Schwinn* entirely.

The majority below also cites the *Schwinn* and *Topco* orders on remand which, while explicitly forbidding resale restraints, authorize location franchises. As Judge Kilkenny's analysis shows (Pet. App. 70-74), to read those decrees the way the majority does would in each instance be to view the exception in the decree as swallowing up the basic prohibition of the decree. It would also require the view that the District Court on remand had exercised the prerogative to ignore the opinion and mandate of this Court. Those decrees allow the designation of franchised locations to which the manufacturer will ship; they explicitly forbid restrictions on where the buyer may resell. Similarly the majority cites cases like *Kaiser v. General Motors Corporation,* 530 F.2d 964 (3d Cir. 1976), aff'g 396 F.Supp. 33 (E.D. Pa. 1975) and *Salco Corporation v. General Motors Corporation,* 517 F.2d 567 (10th Cir. 1975), which upheld the practice of franchising by location on records which, unlike this one, were devoid of suggestion that the manufacturer also obtained and enforced promises by dealers that they would not ship merchandise for resale to locations where they were not franchised. That General Motors may lawfully refuse to allow a dealer to change the location of a franchised dealership, the location where the dealer is authorized to hold himself out as the authorized GM dealer and service unit, does not imply that

General Motors can also restrict such dealer from shipping automobiles to a non-franchised location for resale. Cf. *United States v. General Motors Corp.,* 384 U.S. 127 (1966).

A restriction concerning the location where a dealer may trade on the manufacturer's good will is far less restrictive than one which limits where the dealer can resell his own merchandise. A firm with a trademark associated with a particular service—say, Howard Johnson or Chicken Delight—may authorize a franchisee to engage in business under the franchisor's name and mark at a specified location. The franchisor, having a property right in its name and mark, has an obvious interest in how and where they are to be used. Continental, to the contrary, never claimed a right to operate under Sylvania's name or mark in Sacramento. All dealers buying from Sylvania specifically agreed in their "franchise agreement" not to do business under Sylvania's name and each was expressly "under no circumstances [to] be deemed agents or representatives of Sylvania". (Ex. 3; R.T. 1) All a Sylvania dealer was "franchised" to do was to sell under *its own name* and for its own account. Moreover, as he did in respect of exclusive dealerships, Justice Clark specifically instructed the jury that it is lawful for the manufacturer to designate the location for which a dealer is franchised and to decline to grant franchises for different or additional locations. (R.T. 3447-48) The only thing he told the jury Sylvania could not do was restrict where resales were made. (R.T. 3446-48)

The real significance of the permissive case law and decrees about exclusive dealerships and location clauses is that they dramatize the large number and variety of arrangements, all less restrictive than resale restraints, which a manufacturer may lawfully use to achieve any reasonable goal for its distribution system. A manufacturer may use saturation distribution if it chooses; or, to induce particular dealers to handle its products it may grant exclusive dealerships or grant location franchises, or both. The manufacturer may also use a location franchise to protect its good will, and its property rights in its name and mark. A manufacturer can also assure itself of adequate promotion in any area by a "primary responsibility" clause (like that authorized in the *Schwinn* order on remand and in numerous consent decrees like those referred to in footnote 9, supra.)[15] The manufacturer may also adopt specifications about store size, display or service facilities, or the like and can require the dealer to do specified levels of advertising or to meet designated sales quotas. There is no rule against any of these things. Certainly, a manufacturer has a wide range of lawful ways to induce dealers to handle its product and to affect its marketing style. If anything, the manufacturer's interests have been more fully responded to, under present

[15]These clauses assign to a particular dealer the primary responsibility for developing business in a designated area and may require the dealer to give his best effort to do so. Dealers, however, are not forbidden to sell elsewhere. See the concurring opinion of Justice Brennan in *White Motors Co. v. United States,* 372 U.S. 253, 271-272, n. 12 (1963). See also Judge Kilkenny's opinion below. (Pet. App. 81, n. 8)

law, than have the social interests in dealer independence and competition. Schildkraut, *Areas of Primary Responsibility and Other Territorial Restraints In Channels Of Distribution Under The Antitrust Laws: A Legal and Economic Analysis,* 11 Colum. J. of Law and Soc. Prob. 509 (1975). The only things the courts have held that the manufacturer may not lawfully do is specify the prices at which, the areas in which, and the persons to whom a dealer may resell. In Sacramento, Sylvania crossed the clear line between what is lawful and what is not. Compare *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 900 (5th Cir. 1973); *Reed Brothers, Inc. v. Monsanto Company,* 525 F.2d 486 (8th Cir. 1975), *cert. denied,* 46 L.Ed. 645 (U.S. S.Ct. 1976).

III. DENYING A MANUFACTURER THE POWER TO RESTRICT INTRABRAND COMPETITION WILL NOT ADVERSELY AFFECT CONSUMER WELFARE OR RESOURCE ALLOCATION.

The reason the majority below strained to distinguish *Schwinn* was its conviction that forbidding a manufacturer any way to restrict resale competition "would seriously undermine" interbrand competition and hurt resource allocations. (Pet. App. 16-17) The opinion candidly displays that the majority's real quarrel is with *Schwinn* itself — and, for that matter, with *Dr. Miles,* and every case from this or any other court holding a vertical restraint unlawful. While conceding a "sharp divergence of opinion" among economists (Pet. App. 52, note 40), the majority came

down on the side of those who think that vertical resale restrictions may aid interbrand competition and that whether they do or not is a question of fact. (Pet. App. 45-53) Thus, the opinion states that a "number of justifications have been offered for vertically imposed *territorial* restraints" and says that while it expresses "no view as to the validity of these justifications," that "under the rule of reason the ultimate question must be answered by the trier of fact." (Pet. App. 49, note 37) (emphasis added) In support of this position the majority cites: law review commentaries critical of *Schwinn* (Pet. App. 18, note 13); an article by Professor Bork which suggests that antitrust rules should not forbid vertical price or vertical territorial restraints (Pet. App. 49, note 37); an article by Mr. Robinson and several case notes which attack *Schwinn* itself, and conclude that the withdrawn opinion in this case was wrong (Pet. App. 17, note 12); and an article and some of the testimony by Professor Lee E. Preston, Jr., the economist who testified for Sylvania at the trial. (Pet. App. 46, note 35; Pet. App. 48, note 36)

The *first* salient thing about the majority's economic theory is that it draws no distinction between vertical price restrictions, vertical restraints on resale areas in the *Schwinn* form or vertical restraints on resale areas in the Sylvania form. If the economic view embraced below is accepted as the Sherman Act standard, then this Court's decisions in *Schwinn* and in *Dr. Miles* are just as wrong as was the decision by the trial judge in this case. A major article relied

on by the majority (Pet. App. 50, end of note 37) was Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 75 Yale L. J. 373 (1966). It will serve as an example. Far from distinguishing between vertical resale restraints in the *Schwinn* form and those in the Sylvania form, the Bork article contends that all vertical restraints by any firm of any size which either fix resale prices or divide resale markets should be lawful; the author regards all forms of vertical market division and vertical price fixing as essentially the same phenomenon, none of them being of antitrust concern. Id. at 75 Yale L. J. 391, 397-429.[16] For this Court to accept that view would be to reject *Dr. Miles* and every vertical case after *Dr. Miles.* This Court would also have to ignore the recent Congressional decision that all resale price fixing arrangements ought to be sub-

---

[16]The one thing that Professor Bork and economists who insist on the harmfulness of vertical restraints agree upon is that resale price fixing and resale area restraints have essentially the same purpose and effect. Compare: Comanor, *Vertical Territorial and Customer Restrictions: White Motor and its Aftermath,* 81 Harv. L. Rev. 1419 (1968); Stone, *Closed Territorial Distribution: An Open Question Under the Sherman Act,* 30 U. Chi. L. Rev. 286 (1963); Zimmerman, *Distribution Restrictions After Sealy and Schwinn,* 12 Antitrust Bull. 1181 (1967).

It is notable that the part of the Bork article specifically cited below (75 Yale L. J. at 430-453) deals, not with vertical restraints (which are treated earlier), but with the claimed efficiencies of horizontal market divisions. But even here Professor Bork draws no distinction between market division achieved through territorial division, store location agreements, or customer restrictions. Moreover, when Professor Bork goes on to discuss horizontal price restraints (Id. at 75 Yale L. J. 453-465), he not only finds the same kinds of potential efficiencies as in the case of market division, but he explicitly states: "Price fixing and market division are, of course, the same general economic phenomenon." (Id. at 75 Yale L. J. 453)

ject to Section 1 of the Sherman Act. (Public Law 94-145, December 12, 1975). The other articles cited by the majority are much the same. Not one of them proposes a basis in principle or in economic theory for distinguishing between one form of resale area restraint and another. Not one of them, then, provides a basis in principle for distinguishing between this case and either *Dr. Miles* or *Schwinn.*

The *second* salient thing about the majority's economics is that it requires a jury inquiry into issues this Court has held are no proper part of the judicial function. *United States v. Topco Associates,* 405 U.S. 596 (1972).

The *third* matter of note concerning the majority's economics is that even were it sound in principle it would have no proper function in this case. If a jury were ever to be asked to consider whether conceded injury to intrabrand competition achieved offsetting gains for interbrand competition, it ought only to be on credible evidence supporting such a contention. Otherwise, the jury on a rule of reason instruction would have license to speculate. Here, all economic evidence Sylvania wished to present went into the record. Only after hearing it did Justice Clark deny the rule of reason instruction. Cf. *White Motor Co. v. United States,* 372 U.S. 253 (1963). The only economic evidence Sylvania offered was the testimony of Professor Preston, a portion only of which was cited by the majority below. Preston's testimony on direct, quoted by the majority (Pet. App. 48, note 36), is carefully selected. Though it seems to imply

the view that by using resale restraints Sylvania improved interbrand competition among manufacturers, a fuller reading reveals that actually Preston scrupulously avoided saying that. On cross examination Preston admittedly backed away from any such claim. As to the manufacturer level, he conceded that Sylvania was neither a failing company nor even a weak company (R.T. 2954-55) and that he "certainly [was] not" saying that Sylvania's restrictive distribution system helped Sylvania gain or maintain its market share. (R.T. 2955-56) Indeed, Preston admitted that economic theory provided no way to tell whether a restrictive distribution policy yields an off-setting advantage to competition at the manufacturer level. (R.T. 2956-58) He conceded that so far as he could tell Sylvania's post-1962 market share could have been due to any one or more of several factors such as new management, new advertising programs, and an improved product, all of which occurred at the same time as the change in the distribution system. (R.T. 2955)[17]

---

[17]The significance of market share evidence in this case is the indication it gives that manufacturers with small shares have stayed in the market and apparently continued to prosper. (R.T. 2771, 2878-79)

It is also of note that Professor Preston conceded on cross-examination that Sylvania's policy reduced the number of dealers in any area, stating "yes, of course, that is the essence of it" (R.T. 2914-15); that restrictions on resale territories and customers "has an anti-competitive dimension" (R.T. 2917-18) and that such restriction is "serious". (R.T. 2920-21) (Preston's complete testimony appears at R.T. 2872-2970, and is printed in its entirety in the Joint Appendix.)

IV. GRANTING A MANUFACTURER THE POWER TO RESTRICT INTRABRAND COMPETITION WILL ADVERSELY AFFECT CONSUMER WELFARE AND RESOURCE ALLOCATION.

There is a different economic concept than that adopted by the majority below. It is the economic concept embodied in the Sherman Act. It asserts that vertical restrictions, like other restrictions on competition, are harmful. In the first place, if the impetus for enforcing a manufacturer's resale restraint comes from a competing dealer, as it did from Handy Andy in this case, one dealer by influencing the manufacturer has power to decide whether or not it will have to suffer the competition of another. The vertical resale restraint then works very much like a horizontal resale restraint. *White Motor Co. v. United States,* 372 U.S. 253, 267 (1963) (Justice Brennan concurring); Cf. Bowman, *The Prerequisites and Effects of Resale Price Maintenance,* 22 Univ. Chi. L. Rev. 825 (1955). But even when enforcement initiative comes from the manufacturer, consumer welfare is injured. Restricting resale areas will tend to keep dealers from encountering each other. Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath,* 81 Harv. L. Rev. 1419 (1968). To the extent that separate geographic markets are insulated, as were Sacramento and San Francisco here, intrabrand competition is eliminated. The more general significance of this will depend upon how effectively the restricting manufacturer has differentiated its brand. At the retail level, just as in manufacturing, rivalry between traders tends to hold prices down and to motivate efforts to reduce

costs while increasing quality, service and customer convenience. See *Northern Pacific R.R. v. United States,* 356 U.S. 1, 4-5 (1958).

Moreover, competition at the retail level, as at others, fosters economic stability, fair and rational income distribution, and an economic climate in which any person can aspire to independence and growth. Dispersion of political, social and economic power is also encouraged, as are fair and objective decisions dictated by market forces; and discretionary decisions by executives of firms with market power are avoided. These values are all relevant to the development of a sound antitrust policy with respect to the distribution sector. See, e.g., *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964); *Brown Shoe Co., Inc. v. United States,* 370 U.S. 294 (1962).

The assertion by the majority (Pet. App. 49-50, note 37) that resale restraints may be needed to encourage dealers to handle a manufacturer's product is groundless. As shown in Part II, supra, less restrictive enticements are available. Absent restraints, some dealers will no doubt seek to invade the territory of others. If an invading dealer is more efficient and more effective than the one it challenges, it is indeed possible that it will drive the latter dealer out of business. But whether the invading dealer alone survives, the existing dealer alone survives, or both survive, this contest is precisely what the Sherman Act protects. The Act envisages decisions about price, area and other important matters being made by numerous competing dealers, some of whom will

judge right and some of whom will judge wrong. It does not sanction a monolithic and untested judgment by the manufacturer acting as a "manager" of all the units in the economy handling his product. To the contrary, the Act mandates that a public judgment be made in the market place, where the dealer bets his capital that he knows what he is doing and the consumer votes with his purchasing power to tell the dealer whether he is right or wrong.

The contentions of the majority (Pet. App. 49-50, note 37) that a manufacturer must impose resale restraints to encourage dealers to provide point-of-sale promotion, display facilities or post-sale services also fail. It is argued that no dealer will incur these expenses if others are free to invade the market. To the extent these arguments relate to a real need it can be met through less restrictive means. (See Part II, supra) But the more comprehensive response is that competition should determine what the public really needs or wants. For example, consider the claim about display facilities. If some segment of the public prefers expensive shopping amenities to lower prices, it will pay the higher prices these require. A dealer who bets his capital that he can sell more by lowering prices and skipping the frills will lose. But if customers prefer the low prices, that dealer will prosper. This is what should happen. If the public generally, or some significant segment of it, should in fact prefer to skip the amenities and pay the lower price, and if some dealer is ready to risk his capital on a judgment that this is so, it would be a grave distortion of the competi-

tive process to allow the manufacturer to impose on all concerned its narrower conception of an orderly market. True, if most dealers offer amenities, a few back-street discount houses may operate on an order-taking basis, at lower prices than department stores and other traditional retail merchants who find display facilities in their own self-interest. But again, such a situation will only arise if the market supports it; and further, the existence of that back-street order-taker is hardly a great social evil which warrants distortion of the competitive process. There are always rewards, of sorts, for the imitator as well as the innovator, the back-street trader, the second-hand dealer, and others. There is room for them as well as for the major merchandisers. Such variety gives zest and color to the urban market place, and makes it the stimulating bazaar it is.

Next, consider the "post-sale service" aspect of the "free ride" theory. When a manufacturer determines that merchandise must be sold at a price which will produce a high enough profit to allow for post-sale service and therefore gives its dealer territorial protection, the manufacturer is actually giving sanction to a tying arrangement which enables the dealer to carry on an unprofitable or break-even service department with the supra-competitive profits gained on protected sales. This also distorts the allocation of resources which competition would generate. Dealers offering goods to the public should compete with each other in the sale of those goods; those offering repair service to the public (whether the same dealers

or others) should compete in the sale of such service. If a single seller wishes to offer a "package deal," such as a TV set plus a year's service at a single price, there can be no objection, so long as the alternatives of separate purchases are open to buyers. But to say that a manufacturer can provide protected areas in order to enable dealers to gain excess profits on sales, with which to subsidize a service department, is to radically distort the competitive process.

The majority's view assumes that the manufacturer knows better than the market how dealers ought to be deployed and what services and facilities they should offer in order to maximize output. But this argument, like the comparable one in favor of resale price maintenance, assumes that the manufacturer will always know what is best and that his administered judgment about the ideal deployment of outlets across the nation will be more efficient than the deployment achieved through the myriad individual decisions by dealers who have invested in the distribution process. This assumption undercuts the primary policy commitment of the antitrust laws, and the conviction that individual market decisions are likely to be more sensitive, flexible and accurate gauges of the way resources should be deployed than any monolithic, administered decision. The contrary view also involves that same display of paternalistic overreaching as does the view that manufacturers should be allowed to set resale prices. Both would accord to the manufacturer, though it is not bearing the risk or expense of forward integration, the prerogative to dis-

place the presumably independent dealer-businessmen, who are bearing that risk and expense, in the making of crucial business decisions.

The "skimming" argument made by the majority (Pet. App. 49-50, note 37) also has a moral or ethical quality. An invading dealer is seen as a shadow figure who moves into someone else's territory to "pirate" sales apparently viewed as belonging to the local dealer, and then disappears, having invested nothing, yet reaping a profit. This argument cannot be made in support of Sylvania's resale location restriction, as distinguished from a territorial restriction in the *Schwinn* form, because Sylvania's restriction does not preclude the distant dealer only from entering without investment; that is just what Sylvania claims the distant dealer may do. To the contrary, Sylvania's restriction precludes the outside dealer from entering with an investment—from opening a store where he wants to sell.

But the "skimming" argument has a more basic defect which becomes apparent when one looks beyond the surface of the metaphor. The majority does not explain how the outside dealer is able to skim. The only possible explanation is that the local dealer has been able to amass sufficient market power to generate high profit sales. The only thing that could conceivably be "skimmed" is the "cream" on the top of the market—high profit sales—that is, sales which can be achieved either at higher prices or at lower costs than most sales. Such sales must be to buyers with a fixed preference for the particular manufacturer's

brand—to those who will pay more, or who can be sold with less expense, despite the options open to them as a result of interbrand competition. See Zimmerman, *Distribution Restrictions After Sealy and Schwinn,* 12 Antitrust Bull., 1181, 1182-86 (1967). If each dealer has territorial protection, customers committed to the brand and unaffected by interbrand competition *will* pay the protected dealer's asking price. As these customers view the market, the protected dealer is a monopolist. Interbrand competition means little or nothing to them. However, if another dealer "invades" the territory, intrabrand competition is provided. These presold, brand-committed customers then have more than one option. Therefore, "skimming", well analyzed, turns out to be merely providing competition where none before existed; and this is what the Sherman Act is intended to encourage. See *Copper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d 934, 941, 943, note 5, rehearing denied, 509 F.2d 758 (5th Cir. 1975).

V. THERE IS NO FAILING COMPANY OR RETROACTIVITY DEFENSE TO BE PRESERVED FOR FURTHER PROCEEDINGS IN THE COURT OF APPEALS.

Sylvania, at page 10 of its brief in opposition to the petition for certiorari, claims to preserve here and for proceedings on remand from this Court a failing company defense and a retroactivity defense. In neither case is there a defense to be preserved. This Court should say so, and make sure by its mandate that this case, already five years in the Court of Appeals, is not bogged down in that court again.

A. The Holdings of Schwinn and Other Cases Show That The "Remaining In Business" Instruction Was Properly Denied.

The majority below said it was "unnecessary now to decide whether there was sufficient evidence to warrant instructing the jury on the failing company defense", but, for the district court's guidance, that even if a company is prosperous overall "the failing company defense is applicable if the company is failing in . . . [only] one of its significant products". (Pet. App. 53-54, note 41) The issue thus mooted is hypothetical and should not be allowed to further delay final disposition of a case that has been taxing the time and resources of the courts and the parties for twelve years. *First,* there is literally no evidence that Sylvania was failing either as a whole, or in its TV business. *Second,* Sylvania did not request a failing company instruction. Rather, it asked for an instruction which would allow the jury to consider in justification factors which *Schwinn* rejected. (See Sylvania's requested instruction No. 61, C.T. 1299-1301) These points can be quickly demonstrated.

Sylvania's resale restrictions were initiated in 1962. It was stipulated that Sylvania's company-wide profits from all operations were $24 million in 1960, $8½ million in 1961, $17 million in 1962, $40 million in 1965, and in excess of $84 million in 1966. (R.T. 2614-17) Sylvania introduced no evidence to show what portion of these profits came from TV sales for 1962 or any other year. It did not introduce any evidence of the capital invested in that part of its business or any other, or any evidence as to the rate of return on investment.

Sylvania's only justification evidence was that in 1962 it was not satisfied with its share of the TV market. Its only witness on the point was Ray Steiner, a Sylvania sales supervisor, who said the "sales branch" of Sylvania "considered economic alternatives" and concluded that *if* the company distribution program didn't work, and *if* it didn't increase its market share, and *if* it didn't keep operating its Batavia plant, there was the alternative that it *might* go out of the television business. (R.T. 2543-44) Though Sylvania's President, Robert Theis, its Comptroller and Chief Financial Officer, Lee Lockhart and its Vice-President for Marketing, John Morgan, all presented testimony, none said or implied that the TV business was anything but profitable in any year, or that Sylvania had at any time even considered going out of the TV business. Further, the parent company, G.T.E. Sylvania Incorporated,[18] offered no testimony at all respecting any such proposition. Surely a jury should not be allowed to infer from the fact that Sylvania had a small market share in 1962 that its TV operations were failing. A firm with a small share of a large market could be earning the same return, a smaller or a larger return than one with a large share. From share statistics alone—and

[18]From 1962 through the time of trial Sylvania conducted its TV business by way of a subsidiary corporation, Sylvania Electric Products, Inc., which was wholly owned by General Telephone and Electronics. During appeal Sylvania eliminated such subsidiary and continued its TV business by and through the former parent, renamed G.T.E. Sylvania Incorporated, which was substituted as appellant (now respondent) herein.

that is the only evidence, save the sales supervisor's statements of dissatisfaction—it is simply not possible to draw any inference about profitability.

Clearly, Sylvania cannot avoid the antitrust laws if it was not failing—if, as the evidence shows, it was small but profitable. Being dissatisfied with one's share of the market has never been an antitrust defense even for a firm that might leave the business unless it is granted an antitrust exemption with which to pursue a larger share. *Citizen Publishing Co. v. United States,* 394 U.S. 131 (1969) emphasizes that to qualify for such exemption a firm must be literally failing. *Citizen Publishing* also shows that a firm claiming the justification must have exhausted all other alternatives before it may resort to conduct otherwise unlawful in order to save itself; such standards govern whether the failing company defense is claimed "in a merger or in any other case" (394 U.S. at 138. See also *United States v. Greater Buffalo Press, Inc.,* 402 U.S. 549 (1971). Here, there were several less restrictive, lawful alternatives (exclusive dealerships, primary responsibility clauses and location clauses) which Sylvania did not try. (See Part II, supra). Furthermore, even if Sylvania had been a failing company in 1962 (which it was not), that fact would not justify a predatory foray at the demand of a protected dealer, launched more than two years later when conditions had changed and prosperity had arrived. Compare *United States v. Jerrold Electronics Corp.,* 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam,* 365 U.S. 567 (1961).

The failing company issue is hypothetical also because the instruction which Slyvania sought and the trial court denied would not have been justified even if there were credible failing company evidence. The requested instruction would purport to "justify" conduct otherwise unlawful upon a showing that confining areas where dealers could resell was needed for *either* of two reasons: (1) "to enable Sylvania to remain in the television business"; (2) "to enable it to increase the strength and effectiveness of its competitive efforts." (Sylvania's requested instruction No. 61, C.T. 1299-1301, 1300; Pet. App. 15, note 11) This "justification" is nearly as permissive as Sylvania's "rule of reason" request. It would protect even a well entrenched, financially successful firm which either: (1) did not plan to "remain in the television business" unless it could use otherwise unlawful resale restrictions; or (2) felt that the use of such otherwise unlawful restrictions would "increase the strength and effectiveness of its competitive efforts." To allow such an inclusive exception would negate *Schwinn* entirely. (See 388 U.S. at 375). Compare, *United States v. General Motors Corporation,* 384 U.S. 127, 142 (1966).

B. Sylvania Has Shown Neither A Clear And Established Rule Sanctioning Its Conduct At The Time It Acted, Nor Any Element Of Reliance.

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) conceded a possible retroactivity defense where there was

> "a clearly declared judicial doctrine upon which [the party] relied and under which its conduct

> was lawful, a doctrine which was overruled. . . ." (392 U.S. at 496).

Sylvania seeks to preserve here its contention that *Schwinn* established new law overruling established doctrine upon which it relied. The attempt should fail, for Sylvania satisfies neither the "clearly declared" doctrine nor the reliance elements of the *Hanover* concept.

To show a prior established doctrine Sylvania cites *Boro Hall Corp. v. General Motors Corp.,* 124 F.2d 822 (2nd Cir. 1942), *rehearing denied,* 130 F.2d 196 (2nd Cir. 1942), *cert. denied,* 317 U.S. 695 (1943), which sanctioned a limit on where an automobile dealer might sell by reasoning that it "would not be a burden upon the sales of Chevrolet cars in interstate commerce as a whole, for anything the plaintiff lost the other dealers would gain." (130 F.2d at 197) Such a rationale was flatly rejected in *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959). But even before *Klor's* the *Boro Hall* case had ceased to represent, if ever it had, a clear and established doctrine, or a fit object for reliance.

Boro Hall was first placed in shadow by *United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707, 721 (1944) where this Court said that a seller "may not lawfully limit by agreement . . . the persons to whom its purchasers may resell." *Boro Hall* was also out of harmony with cases holding horizontal territorial allocation unlawful (e.g., *Johnson v. Schlitz Brewing Co.,* 33 F.Supp. 176 (E.D. Tenn. 1940) *aff'd,* 123 F.2d 1016 (6th Cir. 1941)) and those hold-

ing vertical price fixing unlawful *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

By the late 1940's the Justice Department, using a *per se* theory, had started bringing cases against sellers who confined resale areas. In 1948 it obtained a consent decree in *United States v. Libby Owens Ford Glass Co.*, 1948-49 CCH Trade Cases ¶62,323 (N.D. Ohio 1948). Thereafter, scarcely a year passed in which similar suits were not brought and similar decrees entered.[19] Commentators, moreover, long regarded the legality of such restrictions as anything but clear. Judge Rifkind, as early as 1954, told antitrust practitioners, he "would not, in advising a client, rely strongly on *Boro Hall,*" and added, as to promises confining resale areas:

> "I think . . . these promises . . . extremely dangerous. Regardless of the extent of the market affected or any other consideration, I think it quite likely that a set of such promises, with various distributors, would be held unlawful as a direct elimination of competition." Rifkind, *Division of Territories,* in Van Cise and Dunn, *How To Comply With The Antitrust Laws,* 127, 134-135 (1954)

[19]See the collection of sixteen such decrees entered betwen 1948 and 1962 which are cited in Stewart, *Franchise or Protected Territory Distribution,* 8 Antitrust Bull. 447, 470 n. 51 (1963). This enforcement program, its results and the doubt it cast on *Boro Hall* were widely noted in the literature. E.g., Jordan, *Exclusive and Restricted Sales Areas Under The Antitrust Laws,* 9 U.C.L.A. L. Rev. 111, 142-155 (1961), Kessler & Stern, *Competition, Contract and Vertical Integration,* 69 Yale L. J. 1, 113 (1959). The Justice Department's view of per se invalidity was also given currency before Congress: *Automatic Distribution, Hearing Before Senate Committee on Interstate and Foreign Commerce,* 85th Cong., 2d Sess. 65-66 (1958); *Automobile Marketing Legislation, Hearings Before A Subcommittee of House Committee on Interstate and Foreign Commerce,* 84th Cong., 2d Sess. 359-65 (1956).

See also Stone, *Closed Territorial Distribution: An Open Question in the Sherman Act,* 30 U. Chi. L. Rev. 286, 288 (1963).

Next followed *White Motor Co. v. United States,* 372 U.S. 253 (1963). The District Court, viewing it per se unlawful to confine resale areas, granted summary judgment. The Supreme Court reversed, intimating "no view one way or the other on . . . legality" (372 U.S. at 261), because it felt a fuller record was needed before the governing rule could be fashioned. None could have read that case as leaving it "clear", or as inviting reliance, that after trial such restraints would be held valid. A typical comment on the *White Motor* case read as follows:

> "All [of the considerations involved] militate toward eventual per se treatment of the problem—a solution which would extricate the courts from this morass of inconclusive speculation, strike down the conceded restraints of trade, and remit manufacturers to available, less restrictive means of inducing their dealers to compete with other brands." Note, *The Supreme Court, 1962 Term,* 77 Harv. L. Rev. 62, 172 (1963).

Significantly, on remand the defendant in *White Motor* signed without trial the consent decree forbidding area confinement which had become so typical. (1964 CCH Trade Cases ¶71,195 (N.D. Ohio 1964))

Before Sylvania acted against Continental in September, 1965, there was one additional development:

Schwinn was decided in the district court. As this Court later noted, the case involved "challenged *vertical restrictions* as to *territory* and dealers. The source of the restriction is the manufacturer." (388 U.S. at 273) (emphasis added) The district court saw territorial confinement as *per se* unlawful and enjoined *Schwinn:*

> "from limiting the territory within which any wholesaler or jobber may sell any Schwinn product which it has purchased. It held that there are agreements to divide territory and, as such, are *per se* violations of §1 . . . ." (388 U.S. at 376)

On appeal that principle was later adopted and expanded by this Court.

Given this history, it surpasses credulity to claim that when Sylvania acted against Continental in Sacramento, *Boro Hall* stood as "clear and established doctrine" under which Sylvania could lawfully confine a dealer's resale area. As Mr. Justice Clark remarked: in light of the history and "the general understanding in the antitrust bar," even a law student would have said, "Look, Mr. Sylvania, you'd better watch out." (R.T. 3572-73) This conclusion is reinforced when it is recalled that Sylvania proceeded against Continental on the demand of its protected dealer, Handy Andy (see *White Motor Company v. United States,* 372 U.S. 253, 267 (1963)), and in a coercive manner. (See *Simpson v. Union Oil Company of California,* 377 U.S. 13 (1964)). The retroactivity defense is an equitable principle; when available at all, it can be claimed only by one who has proceeded irreproachably.

Sylvania also fails to meet the second *Hanover* prerequisite: it offered no evidence to establish that in fact it relied on *Boro Hall,* or any other legal doctrine. The evidence is to the contrary, that it proceeded unheeding of the law. *First,* the record shows that Continental obtained legal advice, so informed Sylvania, and acted on it. (R.T. 279-80, 1534-35) But we are left to speculate whether Sylvania did the same and, if so, what advice it received. Since such missing information is within Sylvania's control, and particularly in light of the historical development and climate of antitrust opinion reviewed above, the inference is strong that Sylvania obtained no advice or advice adverse to it. *Second,* a sense of guilt is projected by Comptroller Lee Lockhart's anxiety that Sylvania's involvement in the attack on Continental be hidden (R.T. 311, 3255), hardly the attitude of one acting under an established legal doctrine. *Third,* Sylvania persisted in the use of the elbow room restrictions after *Schwinn* was decided by this Court and through the time of trial in this case. (R.T. 91, 643, 2541-42, 3511-12) This alone destroys any contention that Sylvania acted in reliance upon pre-*Schwinn* doctrine which was overruled by *Schwinn;* if the basis for the practice had been reliance, when the object of reliance ended the conduct would have changed.

Finally, if (as Sylvania has been insisting throughout this long litigation) this case differs from *Schwinn* because of the form of Sylvania's restraint, then Continental is entitled to "the fruits of successful litigation". *Simpson v. Union Oil Company of California,*

396 U.S. 13, 14 (1969). Indeed, since Continental commenced this suit before *Schwinn* was decided in this Court, the "fruits of litigation" principle announced in the 1969 *Simpson* case entitles Continental to prevail even if *Schwinn* could be viewed as new law changing an old and settled principle on which Sylvania in fact relied. Continental did not start litigating on the strength of the government's victory in the *Schwinn* case. Continental has been persistently pursuing redress for a grievance of its own, a pursuit begun two years before *Schwinn* was decided in this Court.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded with direction that the District Court judgment and decree be reinstated in all respects. Further, Petitioners should be awarded reasonable attorney fees for Appellate proceedings in this Court and in the Court of Appeals below.

Dated, November 19, 1976,

Respectfully submitted,

LAWRENCE A. SULLIVAN,
Boalt Hall School of Law,
Berkeley, California 94720,
Telephone: (415) 642-5451,

GLENN E. MILLER,
800 Crocker Plaza,
San Jose, California 95113,
Telephone: (408) 294-9046,

Attorneys for Petitioners.

JESSE CHOPER,
Boalt Hall School of Law,
Berkeley, California 94720,
Telephone: (415) 642-5451,

RUDY, RAPOPORT & HOLDEN, INC.,
235 Montgomery Street,
San Francisco, California 94104,
Telephone: (415) 981-4850,

Of Counsel.